

# **EXHIBIT 1**

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1 - 157

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

CONSUME, ET AL, )  
Plaintiffs, )  
 )  
-V- ) CIVIL DOCKET NO.  
 ) 01-12257-PBS  
ABBOTT LABORATORIES, ET AL, )  
 )  
Defendants.)

MOTION HEARING  
BEFORE THE HONORABLE MARIANNE B. BOWLER  
UNITED STATES MAGISTRATE JUDGE

January 31, 2008

Boston, Massachusetts

APPEARANCES ON PAGE 2

Proceedings recorded by electronic sound recording,  
transcript produced by Apex Reporting.

APPEARANCES:

For the United States:

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GEJAA GOBENA, ESQ.  
JUSTIN DRAYCOTT, ESQ.  
U.S. Department of Justice  
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For the Defendants:

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For the Intervenor:

JAMES BREEN, ESQ.  
The Breen Law Firm, PA  
3562 Old Milton Parkway  
Alpharetta, GA 30005

1 not privileged.

2 We believe that Judge Saris will grant our request  
3 to file the first amended complaint.

4 And, again, even though we were in a position of a  
5 pending motion to dismiss, we all proceeded with discovery.

6 This is no different -- deadline for discovery now  
7 is March 31. So, we don't want to be caught again in the  
8 same position where we don't have this information to depose  
9 the right witnesses about in the next two months. And we  
10 just ask that Abbott produce that now.

11 I have a second argument on transactional data,  
12 but you may want to take that one first, because I think  
13 it's straightforward and simple.

14 THE COURT: All right, .

15 MR. WINCHESTER: Quickly, Judge, as to Acyclovir,  
16 our position really is: One, we have produced Acyclovir  
17 documents to the extent that documents mentioning Acyclovir  
18 fall within one of four categories of documents; the  
19 cross-cutting type of documents that your Honor set down in  
20 terms of what used to disclosed in the case back in, I  
21 think, in May of last year. So they do have documents  
22 relating to Acyclovir.

23 The greater body, however, of transactional data,  
24 do we have to dig up and pull together for them every price  
25 which we ever sold any unit of Acyclovir, or go through the

1 burden of basically going through our entire production  
2 again -- all through Abbott, again, and try to pull any  
3 additional documents relating to Acyclovir that are things,  
4 perhaps responsive to their request, but that don't  
5 otherwise mention reimbursement or AWP or spread or those  
6 kinds of documents, which they already would have.

7 And our position on that is, the motion to dismiss  
8 we have pending, is a little different than the ones,  
9 initially. This is isn't, you haven't stated a claim.

10 The basis of our motion, I won't dwell on too  
11 long, but it's really that there is no claim.

12 The Government is here as an intervenor -- to  
13 intervene in claims, Ven-A-Care has. And as of the time  
14 they moved to intervene, Ven-A-Care had already amended its  
15 complaint to drop claims related to Acyclovir.

16 So our point is, and I know Mr. Breen and  
17 Ms. Brooker will disagree. That's why it's before Judge  
18 Saris.

19 In our view there are really no claims for the  
20 Government to assert here on Acyclovir.

21 So for us, what we're really looking at is a  
22 burden issue to go through and do all of this, which  
23 ultimately we think would be in the service of nothing  
24 because those claims don't exist and should be dismissed.

25 THE COURT: Denied without prejudice to be renewed

1 after the ruling on the motion by Judge Saris.

2 MS. BROOKER: Your Honor, on the second set of  
3 documents, this is really about Abbott's entire  
4 transactional data set, not including, obviously, the  
5 Acyclovir Sodium, I had been prepared to indicate to the  
6 Court today that this issue now appears to be moot because  
7 we had gone back and forth. There's a whole history of it  
8 since the filing of this motion and for years prior in the  
9 Texas case with trying to get accurate transactional data  
10 from Abbott.

11 However, I'm not sure if we're in a little bit of  
12 a different place today, but I will just lay out briefly the  
13 few facts.

14 You know, we've been requesting the transactional  
15 data on the drugs since the outset of the litigation. Even  
16 prior to the litigation, we had been requesting the  
17 transactional data at different points in time.

18 We believe, for Abbott's representations, that we  
19 had the final set of data. We have gone through a lot with  
20 this data.

21 The State of Texas is getting some of the same  
22 data and so we have followed along with what's been going on  
23 in their litigation.

24 Abbott has been sanctioned for not producing this  
25 data timely or completely or accurately.

1 sources of where there might be documents about these  
2 revenues or profitabilities on that.

3 But, let's just say we've been a fairly open book  
4 on this subject.

5 They have the data that will show them everything  
6 they want. They know want it in some other form or fashion.

7 MS. BROOKER: Your Honor, again, the CHIPS data  
8 allows us to manipulate. We don't want to manipulate the  
9 revenues. We want the information that shows what Abbott  
10 knew about what revenues, what profitability, we want to see  
11 the discussion that has to go to the motive in this case.

12 We're not going to send in someone to just  
13 recalculate the revenues. That's not useful to us. That  
14 information is not useful to us.

15 The information that is, are the actual hard  
16 copies of the documents that show how they sorted through  
17 the revenues; what they presented to one another; what they  
18 presented up their chain; what they discussed about what  
19 they discussed internally; what they interpreted those  
20 numbers, not just the raw numbers. The raw numbers are but  
21 a tiny little piece of this. And what we actually want are  
22 the documents.

23 Again, I would ask that Abbott be obligated,  
24 within 20 days from today, to identify because this may  
25 clear up a lot of future motions practice; to tell us for

1 all the outstanding requests for production, which ones that  
2 they have completed production on.

3 If they are telling us that we have everything and  
4 what we have--

5 THE COURT: But that's a reasonable -- at this  
6 point, that's a reasonable request so you know the status of  
7 where you are.

8 MR. WINCHESTER: I think your Honor already just  
9 ordered that after the last motion.

10 It's 30 days to tell them -- and, basically, at  
11 this point, after all this motion practice, we're talking  
12 about categories, is that once we've come in their hundreds  
13 of Requests for Production--

14 THE COURT: Okay, same ruling, 30 days.

15 MR. WINCHESTER: You have that ruling, Judge.

16 MS. BROOKER: So, within 30 days, Abbott will tell  
17 us for every set of document requests, which ones that they  
18 have completed and which ones are still pending and they're  
19 producing on.

20 MR. WINCHESTER: For categories of information, we  
21 will certainly be able to do that.

22 MS. BROOKER: Now I know Mr. Winchester just said  
23 a tricky little thing there.

24 We are entitled to know which requests for  
25 production Abbott has completed its production, not

1 categories of documents, but it's request for production.

2 The way that this litigation has been proceeding  
3 with respect to Abbott's document production is we are  
4 forced to learn, way after the fact, through witnesses,  
5 through Texas, other outside parties that are bringing in  
6 documents, "Oh, here's another category of documents, for  
7 example, the Medicare working group. We didn't know about  
8 that."

9 Now we know about the existence. So now it's a  
10 category we're seeking.

11 Abbott -- under Rule 34, we are entitled to know  
12 for each Request for Product, which my understanding is your  
13 Honor has ordered, for each request for production, Abbott  
14 must state within 30 days we are finished with request No.

15 1. We are finished with request No. 2.

16 Is that correct, your Honor?

17 THE COURT: I think that's reasonable.

18 MR. WINCHESTER: We have a similar order that the  
19 Government is in Ven-A-Care also so obligated?

20 THE COURT: Certainly.

21 All right. Anything else in 4799?

22 MS. BROOKER: Yes. There are two more issues,  
23 your Honor.

24 Okay, the time period. This Court has ordered  
25 that documents be produced up to and including 2003.

1                   And also to cut off -- and to fully discover any  
2 evidence that they may want to raise there is somehow  
3 remediated the conduct.

4                   THE COURT: Well, that may have been that at this  
5 point, 60 days ago, my ruling stands.

6                   MR. BREEN: Thank you, your Honor.

7                   MS. BROOKER: Your Honor, the last issue is  
8 actually related to documents in this motion, but it's not a  
9 request for production of documents. It's the  
10 confidentiality designations.

11                  Abbott has wielded the protective order in this  
12 case in a way that I would -- that I believe it has been  
13 shown that it basically obliterates the good faith  
14 requirement in the rule that a party, particularly Abbott,  
15 needs to review each document it produces to make a  
16 legitimate designation, either confidential or highly  
17 confidential.

18                  The burden is on Abbott for good reason. The  
19 Court and the Government has no idea about their documents  
20 and what meets the standards for confidentiality. It should  
21 be properly on Abbott.

22                  If Abbott were to have its way here, what it has  
23 suggested in its opposition is that we should be bringing  
24 individual motions to the Court every time we want to  
25 challenge a document, because Abbott says that's what the

1 protective order, itself, allows.

2 That would unreasonably tie up this Court and the  
3 Government and the parties in endless litigation challenging  
4 on a document-by-document basis Abbott's designations.

5 Judge Saris has given express guidance on, I  
6 believe, three occasions, about -- and cautioned the parties  
7 in not putting under seal when the file something, a  
8 document that is marked as confidential.

9 In this case, that has happened repeatedly because  
10 pretty much every document, every page of every document by  
11 Abbott is stamped, "Confidential."

12 It seems clear to me, and I have placed in the  
13 binder here, really just one of thousands of pages of  
14 examples because I, myself, have gone through numerous  
15 documents myself, in this case.

16 THE COURT: What tab are you at?

17 MS. BROOKER: I'm at tab 15. These are these  
18 blank pages that I placed in here. I could have filled up  
19 several boxes with blank pages.

20 And the reason why I use this as an example: Is  
21 this a highly relevant document that the Government is going  
22 to seek to admit at trial? Of course not. It's a blank  
23 page.

24 But it does show that Abbott just has the rote  
25 machine on, and it's just stamping everything that goes out

1 the door as "Confidential."

2 That cannot possibly meet the terms of the  
3 protective order.

4 Judge Saris has now expressly said pricing  
5 information more than five years ago is not commercially  
6 sensitive, nor is commercial information from the 1990s.

7 Now, granted, Abbott will say, "Well, that order  
8 was issued in the context of placing some document marked in  
9 discovery under seal." And I recognize that.

10 However, since the Judge has issued that order,  
11 Abbott has not stopped its automaton. I mean, the machine  
12 is still going; everything is still coming out the same.  
13 It's not even, on a going forward basis, trying to change  
14 what it's doing with its confidentiality designation.

15 Judge Saris cited Rule 11 in several of her  
16 orders, signifying that she's about had it with the  
17 over-designation of materials.

18 Abbott cannot hide behind the burdensome objection  
19 because it is its good faith obligation.

20 I would also say that Abbott cannot stand up here  
21 and say, use the -- excuse me -- use the protective order to  
22 challenge because we have done that.

23 In the few instances, where the United States has  
24 sent letters to Abbott initiating a -- for lack of a better  
25 term -- I guess it's a "meet and confer," initiating the

1 process under the protective order for Abbott to  
2 de-designate, Abbott has just ignored entirely, our letters.  
3 There is no response at all.

4 So, even if we wanted to clog up this Court with  
5 10,000 individual motions, or a group of motions, we're not  
6 able to do that because Abbott won't even respond to our  
7 request to de-designate. It's also no way to handle the  
8 situation.

9 I will additionally say, just briefly, there is  
10 authority -- obviously, this Court has authority under Rule  
11 1 -- you have broad authority. But there are now two other  
12 instances, where similar relief has been granted, where a  
13 party is over-designating.

14 I cited the United States versus Philip Morris  
15 case, and that was cited in the motion. That was a case  
16 that I tried, myself, and I was involved in that motions  
17 practice.

18 That was not even the types of designations --  
19 Philip Morris wasn't even designating every page. There  
20 were quantities and that was certainly a 26,000,000 page  
21 case.

22 But there the Court, the Special Master and upheld  
23 by the District Court Judge, made them go back and re-look  
24 at all of their designations in fairly short order.

25 And, also, I think very relevant, your Honor,

1 behind tab No. 16, for your Honor's law clerk to also look  
2 at, is a recent decision in the Commonwealth of Pennsylvania  
3 versus TAP Pharmaceuticals and Abbott Laboratories and a  
4 bunch of other defendants, where the same kind of relief was  
5 granted.

6 And on page 4 of that memorandum and opinion, the  
7 Judge said, "Directing in the final protective order that  
8 older, greater than five year-old information, be designated  
9 confidential only if they reflect current practices," which  
10 is a standard similar to what Judge Saris has adopted.

11 The defendants in that case, and I don't know  
12 anything about the specifics of this, I just have the  
13 memorandum, order and opinion, so I don't know how it played  
14 itself out. But, the order, itself, directs defendants to  
15 review all documents presently designated at confidential,  
16 and de-designate those that are no longer confidential --  
17 the same exact relief that we've asked for.

18 And on a final note, I will say, your Honor, there  
19 is definite prejudice to the United States and the Court,  
20 frankly, in over-designation.

21 As the District Court found and upheld in the  
22 Philip Morris case, the public has a right to hear this  
23 trial. This is not just any--

24 THE COURT: I know Judge Saris feels strongly  
25 about this --

1 MS. BROOKER: That's right.

2 THE COURT: -- not being unnecessarily sealed.

3 MS. BROOKER: And not only that, your Honor, if  
4 Abbott doesn't do this now, it is certainly going to have to  
5 do this at trial.

6 In the Philip Morris case, we had to spend an  
7 inordinate amount of time going through the de-designation  
8 process for trial exhibits. And it hampers our ability to  
9 prepare for trial.

10 These documents require special handling. You can  
11 only show them to certain witnesses; motions practice is  
12 onerous, because just about every motion we file has their  
13 exhibits attached.

14 We have to have a meet and confer with them. We  
15 have to contact them in advance of the motion.

16 So we have asked for a specific order, for which  
17 there is authority, for which, we believe, Judge Saris would  
18 agree that Abbott go back and de-designate all of its  
19 previously produced materials and on a going forward basis  
20 start complying with Judge Saris' recent orders and the  
21 protective order.

22 Thank you.

23 THE COURT: What is your position in this?

24 MR. WINCHESTER: That it is totally unnecessary  
25 and hugely burdensome when we talk about a production that

1 now numbers in excess of a million pages. But there are  
2 provisions in place for this.

3 We understand it's our burden to make the cut in  
4 terms of what's confidential. Counsel shows you a couple of  
5 blank pages out of a million. Those are errors. I have  
6 nothing to say about that. Those are errors that were added  
7 on to there, of course.

8 Overall, I guess the situation is there are  
9 provisions in place to deal with this. And when counsel  
10 says we ignore them, that's totally untrue.

11 They come to us, as the protective order says they  
12 are supposed to, and say, "Here's a set of documents, a  
13 document, a set of documents that we don't think should be  
14 designated confidential. We want to use them."

15 We've taken a look at those and in some instances  
16 we've said, "We agree with you." And in other instances, we  
17 go to the Court and say, "We think these should be kept  
18 under seal."

19 Judge Saris, in fact, put a provision in place,  
20 and a procedure in place for this case to say, "If there are  
21 disputes about what documents should be filed under seal,  
22 and if they are your documents, Abbott, you have the burden  
23 to come forward and show me why they ought to be kept under  
24 seal."

25 So when they come to us with documents and say,

1 "These are the ones we care about from your million pages,  
2 and we don't think they should be designated confidential,"  
3 we take a look at those and if we agree, then we deal with  
4 it in that fashion. If we don't, then we go and bring the  
5 motions to the Courts.

6 The idea that we're going to be in front of the  
7 Court on every document is just untrue.

8 So there are provisions in place to deal with this  
9 that will save us from having to review over a million  
10 pages, the vast, vast majority of which they don't care  
11 about.

12 Counsel talks about, "Well, we're going to have to  
13 do this at trial." And I would submit to the Court, maybe  
14 we will.

15 But at least at that point, we'll have the  
16 category of documents that they care about and intend to  
17 use, which is going to be far less, I'll guarantee you, than  
18 the million-plus we have now.

19 Their challenge is a broad brush. We have  
20 certainly cited cases to the Court in our papers that say  
21 that kind of broad brush is not sufficient to flip the  
22 burden back on the designated party to come forward, as our  
23 protective order says you should, and as Judge Saris' later  
24 order says you should, let's talk about specific documents,  
25 or specific categories of documents.

1           They want to say go back and everything that's  
2 older than five years is now automatically not confidential.

3           We have cases in our papers that say that that  
4 isn't true. It may be in some circumstances, obviously, but  
5 not in every one that a document simply by virtue of its age  
6 become no longer confidential , it can still have sensitive  
7 information that is -- even though it's aged, remains  
8 current and would cause a problem if it were disclosed.

9           So, from our standpoint, Judge, we have been  
10 willing -- continue to be willing to talk with them about  
11 documents that they wish to challenge as confidentially --  
12 but for us, I guess we're asking is that we not be forced to  
13 go back through what is admittedly a huge burden of going  
14 through all million-plus pages.

15           MS. BROOKER: May I just correct one -- I'm not  
16 sure if Mr. Winchester misunderstood me.

17           There are just two separate points here about  
18 utilizing the protective order provisions.

19           There is the instance where we have to meet and  
20 confer before we file a motion to decide is Abbott going to  
21 want this placed under seal, or not.

22           We have been working that out with them. It's  
23 onerous but, yes, we've been doing it.

24           What I'm talking about is a different scenario.  
25 Under the protective order, if a party waives a document or

1 a deposition and says, "This should not be marked as  
2 confidential," that kicks into play a time frame by which  
3 Abbott must respond, a briefing must occur if the parties  
4 disagree whether it should be de-designated.

5 In the few instances where we have sent those  
6 types of letters, they have been for depositions identified  
7 or designated by Abbott, wholesale as confidential, no  
8 response. We've gotten no response.

9 But the protective order provisions that are in  
10 place clearly aren't working and we don't have time to send  
11 them repeated emails or motions on this.

12 And the last thing I would say, your Honor, almost  
13 every single page they produce is confidential or highly  
14 confidential; not just a few blank ones.

15 I just pulled out a few blank ones as an example.  
16 Almost everything. I haven't seen any production that have  
17 come in that are not marked "Confidential" or "Highly  
18 Confidential."

19 And I've had all of our paralegals checking this  
20 on a regular basis to see if their conduct has changed and  
21 we have not seen that it has.

22 THE COURT: Well, I'm going to deny the motion,  
23 but I am going to urge that you, with any further production  
24 in the spirit of what Judge Saris has said, that you be very  
25 cautious in using these designations and not over-designate.

1                   All right. That ends 4799. We're not very far  
2 down the list of what we are going to deal with.

3                   It is 5 after 12, I'm going to take a ten-minute  
4 morning recess. I'll come back -- what time is that  
5 criminal business?

6                   THE CLERK: (Unintelligible) starting at 2:30,  
7 your Honor.

8                   THE COURT: All right, we will go until a little  
9 bit after 1:00 and see where we are.

10                  Okay, be back in ten minutes.

11                  (A recess was taken from 1:02 pm. to 1:17 p.m.)

12                  THE CLERK: Resuming on the record, Citizens for  
13 Consume, et al, versus Abbott Laboratories, et al, Civil  
14 Action No. 01-12257.

15                  THE COURT: Okay, No. 4984.

16                  MS. BROOKER: Thank you, your Honor.

17                  Okay, I spent the ten minutes of the break trying  
18 to see how I could slice and dice this and make it quicker  
19 for your Honor since I'm told we have a lot to get through.

20                  Suffice it to say, we disagree with many of the  
21 representations made in Abbott's brief filed on Friday in  
22 opposition to this motion to compel salespersons personnel  
23 working files and producing them for deposition.

24                  But I'm not going to go through some of those  
25 arguments in detail unless Mr. Winchester does, and then, if